

Opinions, Advice, and Legislation Quarterly News

Office of the
Maryland Attorney General



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OPINIONS

CONSTITUTIONAL LAW – ESTABLISHMENT CLAUSE – BUDGET BILL PROHIBITION ON SPENDING TO FACILITATE PARTICIPATION BY FAITH-BASED ORGANIZATIONS IN CERTAIN STATE PROGRAMS

An uncodified provision of the Fiscal Year 2004 budget bill prohibits the expenditure of State funds for “any policy or program” designed “exclusively or primarily to ... facilitate the participation of faith-based organizations in State programs providing health, social, or educational services.”

Question 1: Absent other legislation, does this provision bar the disbursement of State funds to a “community-based organization”?

Answer: No; the budget bill language does not necessarily bar the disbursement of State funds to a “community-based organization,” as that term is defined in proposed federal legislation.

Question 2: Can a faith-based organization receive grant money from an existing State program if funds are also made available to secular groups?

Answer: Yes; faith-based organizations are eligible for grants under existing State programs that also make funds available to secular organizations.

Question 3: Can State money be spent on a model grant to a faith-based organization to gauge how such groups compare with secular groups in the delivery of social services?

Answer: A one-time grant to a faith-based organization for demonstration purposes would probably not constitute a “policy or program” barred by the budget bill provision; however, such a grant would raise problems under the Establishment Clause of the First Amendment.

Question 4: Would a State program of financial assistance to faith-based organizations violate any federal requirements?

Answer: A State program of financial assistance targeted solely to faith-based organizations would likely violate the Establishment Clause, unless it were part of a broader set of programs that were neutral with respect to religion.

Question 5: Can the Governor create a State office of faith-based and community initiatives, if more than 50 percent of that unit’s work deals with community initiatives rather than with faith-based initiatives?

Answer: Yes; the Governor may create such an office, consistent with both the budget bill language and the Establishment Clause, so long as the services of the office are available on a neutral basis to both faith-based and secular organizations.

Question 6: How would the budget bill phrase “exclusively or primarily” affect the expenditure of funds and the hiring of staff by a State office of faith-based and community initiatives?

Answer: The phrase “exclusively or primarily” does not limit who may be hired for an office of faith-based and community initiatives, or how much time an individual

staff member may spend dealing with faith-based, as opposed to other, initiatives.

*Opinion No. 03-017
October 27, 2003*

**ENVIRONMENT – LEAD PAINT HAZARDS –
STATUTORY REQUIREMENTS FOR POSTER
TO BE DISPLAYED BY PAINT RETAILER**

Question: Does a particular poster comply with recent legislation requiring that a paint retailer display a poster with information about lead paint hazards?

Answer: The poster provided lacked sufficient information to comply with statutory requirements.

*Opinion No. 03-020
December 9, 2003*

**EVIDENCE – EXPERT TESTIMONY ON CAUSE
OF FIRE – LICENSED ELECTRICAL ENGINEER**

Question: In light of State law including the investigation of the cause of a fire within the definition of “private detective services,” may a licensed electrical engineer give expert testimony in a Maryland court about whether a fire had an electrical origin?

Answer: Yes; an electrical engineer may be qualified to give expert testimony on whether a fire had an electrical origin, regardless of whether the engineer is also certified as a private detective.

*Opinion No. 03-019
December 9, 2003*

**MEDICAL MALPRACTICE – DEFENDANT’S
RIGHT TO COMPEL CHANGE OF VENUE**

Question: Does any statute or constitutional provision prevent the General Assembly from enacting legislation that would permit a defendant in a medical malpractice action to request or compel a change of venue as a matter of right?

Answer: Yes; the Maryland Constitution precludes the Legislature from enacting such legislation.

*Opinion No. 03-018
December 9, 2003*

**MEDICAL RECORDS –
CONFIDENTIALITY UNDER MARYLAND LAW
AND FEDERAL HEALTH INSURANCE
PORTABILITY AND ACCOUNTABILITY ACT
OF 1996 (HIPAA)**

Question: While Maryland law provides generally for the confidentiality of medical records, the federal HIPAA law contains a selective preemption provision requiring custodians of medical information to determine whether federal or State law and regulations govern disclosure of that information in various circumstances. How should a custodian make this determination?

Answer: First, the custodian must determine whether the State provision is “contrary” to HIPAA and its implementing regulations, in the sense that it is impossible to comply with both, or compliance with the State law would be inconsistent with the objectives of HIPAA. In most situations there will be no conflict and no need to apply the HIPAA preemption provision.

Second, if there appears to be a genuine conflict between HIPAA and its implementing

regulations and State law, a custodian of medical records should then consider the following questions:

(a) Does the State statute fall under an exclusion in HIPAA for public health or regulatory reporting?

(b) Is the State statute “more stringent” than its HIPAA counterpart?

(c) Has the federal Secretary of Health and Human Services determined either that the State statute is “necessary” to achieve one of the permissible State objectives listed in HIPAA, or that it addresses controlled substances?

If the answer to any of these questions is *yes*, the State provision is not preempted by HIPAA. If the answer to all of these questions is *no*, then HIPAA preempts that aspect of State law.

Opinion No. 03-022
December 18, 2003

**MUNICIPAL CORPORATIONS –
CHARTER PROVISION FOR
BALLOT INITIATIVE**

Question: May the Town of Somerset amend its charter to include an initiative process, by which citizens may propose legislation which, if approved by the voters, becomes law without action by the municipal legislative body?

Answer: The Town may amend its charter to allow for a ballot initiative. Legislation adopted by means of an initiative would be subject to the same constitutional, public general law, and federal law limitations as legislation enacted by the Town Council.

Opinion No. 03-016
October 16, 2003

**WORKERS’ COMPENSATION COMMISSION –
REQUIRING CERTIFICATE OF COMPLIANCE
AS PREREQUISITE FOR
BUSINESS LICENSE OR PERMIT**

Question: If it is not an employer for purposes of the Workers’ Compensation Act, must a business obtain a certificate of compliance from the Workers’ Compensation Commission as a prerequisite to obtaining a business license or permit from a State or local agency?

Answer: No.

Opinion No. 03-021
December 9, 2004

ADVICE LETTERS

**CHARTER COUNTIES –
GENERAL ASSEMBLY AUTHORITY TO
CHANGE CHARTER OR CODE**

Question: Under the Maryland Constitution, what changes may the General Assembly make to the Prince George’s County Charter and the County Code?

Answer: Since the Prince George’s County Code is a compilation including both ordinances enacted by the County Council and public local laws enacted by the General Assembly, the General Assembly can amend or repeal portions of the County Code it has enacted since the County became a charter county. The General Assembly can also supersede County provisions by enacting a valid public general law or a public local law on a subject not covered by the Express Powers Act. Finally, the General Assembly can preempt a subject matter area, thus trumping local legislation in that area.

Letter to Delegate Justin Ross
December 2, 2003

ETHICS LAW

DEFINITION OF “EXECUTIVE UNIT” FOR PURPOSES OF PROCUREMENT RESTRICTIONS

Question: Which units of State government constitute “executive units,” within the meaning of State Government Article, §15-508, which prohibits a person who assists an executive unit to draft specifications or a solicitation for procurement, to select a contractor, or to award a contract, from submitting a bid or proposal for that procurement, or from assisting or representing a bidder or offeror?

Answer: The term “executive unit” is defined in State Government Article, §15-102(m) to cover Executive Branch units established by law. The term embraces most State agencies and offices. Whether boards, commissions, councils, or other State bodies are included depends on whether they are “established by law” – that is, created by State statute, legislative rule, or an executive order having the force of law. A legislative rule is a rule or regulation adopted by an administrative agency pursuant to express statutory authority. An executive order adopted under the Governor’s constitutional reorganization powers or expressly authorized by statute has the force of law. The State Ethics Commission determines whether a board, commission, or council is within the Executive Branch, considering such factors as the appointing authority, who provides administrative and other support, and to whom reports are submitted. The Ethics Commission maintains a list of units it has determined to be executive units.

*Letter to Senator Ida G. Ruben
October 10, 2003*

RESTRICTIONS ON GIFTS TO LEGISLATORS BY LOBBYISTS

Question: Would there be any constitutional objection to legislation that would regulate the receipt of gifts of food and beverages by members of the General Assembly from Maryland lobbyists at out-of-State meetings of a legislative organization?

Answer: No; such legislation would not run afoul of the Commerce Clause of the United States Constitution.

*Letter to Senator James Brochin
December 8, 2003*

NOTARIES PUBLIC – INSURANCE CODE REGULATION

Question: When notaries public attend real estate settlements or closings and provide escrow, closing, or settlement services, do they come within the definition of “title insurance agent” or “title insurance broker” and become subject to licensing and other requirements under the Insurance Code?

Answer: If a notary public is present at a closing or settlement, along with a settlement attorney or other settlement officer, solely to provide traditional notary services, such as verifying identities and witnessing signatures, the notary is not subject to regulation under the Insurance Article. However, if the notary acts alone and provides escrow, closing, or settlement services, receiving compensation beyond the statutory fees for notary services, the provisions of the Insurance Code apply.

*Letter to Delegate Victor R. Ramirez
October 16, 2003*

**REAL ESTATE TRANSFER TAX –
COUNTY AUTHORITY TO REPEAL
EXEMPTION**

Question: Does the Harford County Council have authority to repeal a county transfer tax exemption for the first \$30,000 of consideration paid for certain residential real property, or must the exemption be repealed by the General Assembly?

Answer: Repeal is up to the General Assembly. Although Tax-Property Article, §§13-401 *et seq.* authorize counties to impose transfer taxes and under certain conditions to exempt residential real property from those taxes, and although a separate public local law also authorizes Harford County to impose a transfer tax by ordinance and to provide for exemptions from and credits against the tax, that same public local law establishes the \$30,000 exemption about which you ask. Harford County could repeal the ordinance establishing its transfer tax, and the exemption in question would be eliminated. However, as long as the County retains its transfer tax, only the General Assembly can repeal this exemption.

*Letter to Senator J. Robert Hooper
November 14, 2003*

**SALES AND USE TAX –
AUTHORITY OF COUNTY TO TAX
CELLULAR PHONE SERVICE**

Under Article 24, §9-602, enacted in 1977, Anne Arundel County has broad authority to impose a sales and use tax on “residential, commercial, and industrial telephone service.”

Question: Does this authority permit the County to tax cellular phone service?

Answer: No; although the County’s authority is not free from doubt, in light of the rule of strict construction applied to tax laws, and in light of federal regulation of the taxation of mobile telecommunications, it would be preferable that the General Assembly provide explicit authority for County taxation of cellular phone service.

*Letter to Delegate Herb McMillan
December 11, 2003*

**“WHISTLE-BLOWER” RIGHTS –
EMPLOYEES OF STATE CONTRACTORS**

Question: Do State procurement laws protect employees of State contractors against retaliation if those employees file complaints alleging fraud or corruption?

Answer: No; any protection that might exist would have to be found in the common law “abusive discharge” tort, which authorizes a suit for damages by an at-will employee who is discharged for reasons that contravene State policy.

*Letter to Delegate Pauline H. Menes
December 8, 2003*

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